Supreme Court, U.S.
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No. 97-1247

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1997

JENNELL L. BRANSON
Petitioner

v.

GREYHOUND LINES, INC. - AMALGAMATED COUNCIL RETIREMENT AND DISABILITY PLAN; and GREYHOUND LINES, INC.
Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

BRIEF OF GREYHOUND LINES, INC. - AMALGAMATED COUNCIL RETIREMENT AND DISABILITY PLAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

STATEMENT OF THE CASE[1]

This is a routine denial of benefits case, decided in conformity with the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq. The controlling facts may be set forth relatively simply. Petitioner Jennell Branson worked for Greyhound Lines, Inc. (GLI) as a bus driver from May 1978 until he quit to take another job in July 1987. *Pet. App.* at 2a. Based on his 10 years' service, Petitioner has a vested right to a pension with Respondent Greyhound Lines Inc. — Amalgamated Council Retirement and Disability Plan (the Plan) when he reaches retirement age. This pension right has never been disputed. *Id.* Petitioner returned to work for GLI as a bus driver in April 1990, shortly after the unionized drivers went on strike. *Id.* Petitioner continued to work for GLI at least through the time of the district court trial on September 25, 1996. *Pet. App.* at 33a. Petitioner wishes to have this second period of employment used to enhance his pension benefits in contravention of the Plan language. The trustees denied Petitioner's request to count this latter time toward his pension. After a trial on the merits, the U.S. District Court for the Western District of Texas, in an unpublished opinion, found the trustees acted within their discretion and properly construed the governing provisions of the Plan in denying Petitioner's claim. *Pet. App.* at 41a. The U.S. Court of Appeals for the Fifth Circuit affirmed this ruling in a decision published at 126 F.3d 747. *Pet. App.* at 29a-30a.

Section 2.1(1) of the Plan provides that "an Active Participant who subsequently terminates employment . . . and thereupon loses his seniority under the Collective Bargaining Agreement . . . shall thereafter cease to be an Active Participant regardless of whether [he] is subsequently re-employed . . . ." *Pet.*

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[1]The Petition appears to have been timely filed, and this Court otherwise has jurisdiction to consider the petition pursuant to 28 U.S.C. § 1254(1).

App. at 27a; *Res. App.* at 1a.[2] Pursuant to the Plan, only "active participants" may earn pension credit. *Id.* Accordingly, if Petitioner lost his seniority with GLI when he voluntarily resigned in 1987, he ceased to be an active participant in the Plan at that time and could not earn *additional* pension benefits upon his return to work in 1990. The trustees reviewed the collective bargaining agreement in effect when Petitioner resigned and found it contained numerous specific instances in which employees might retain seniority, such as upon entering the military, going to work for the union, or being involuntarily furloughed for lack of work provided they return when work becomes available. The collective bargaining agreement has no such provision preserving the seniority rights of an employee who otherwise voluntarily resigns. The trial court made a similar finding of fact, *Pet. App.* at 35a-36a, and the court of appeals so noted, as well, *Pet. App.* at 28a.. From this, the trustees concluded that the absence of any language preserving seniority rights for voluntary resignees (such as Petitioner) means they lose their seniority upon termination. Both the district court and the court of appeals held this to be a reasonable interpretation. *Pet. App.* at 28a-29a, 41a.[3] A

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[2]The operative Plan language was set out in the Fifth Circuit's opinion. Respondent has included the pertinent sections of the Plan in its appendix to this brief in opposition. While Petitioner makes certain representations and arguments about the Plan language, he has omitted the text from his petition.

[3]As the Court of Appeals pointed out, this represents a fairly classic application of the doctrine of contract interpretation known as *expressio unius exclusio alterius* — the mention of one thing reflects the exclusion of like things not mentioned. *Pet. App.* at 28a-29a. This rule has been commonly applied to both collective bargaining agreements and ERISA-governed plans. *See, e.g., Barnes v. Independent Auto. Dealers of California*, 64 F.3d 1389, 1393 (9th Cir. 1995) ("Under the doctrine of *expressio unius est exclusio alterius*, we must assume that by expressly providing for subrogation in cases in which the Plan makes payment, the Plan document excludes subrogation when no payment is made."); *Browning Ferris*

contrary interpretation would lead to peculiar results. It would, among other things, place voluntary resignees in a better position than those employees involuntarily furloughed for lack of work. The former would retain seniority rights in perpetuity, while the latter would be divested of their seniority should they fail to return when work becomes available.

At trial, Robert Tancos, a labor relations specialist with GLI, testified that the 1987-90 collective bargaining agreement had always been construed as divesting a driver of seniority if he voluntarily resigned. The trial court made a finding of fact to this effect. *Pet. App.* at 36a. While the trustees did not have Tancos's testimony before them when they decided Petitioner's claim, it does underscore the correctness of their interpretation. Petitioner never presented any contrary evidence to the trustees or at trial. His primary rejoinder was a suggestion that some other labor agreement governs whether he lost his seniority when he quit in 1987. The court of appeals rejected this argument as patently inconsistent with the "thereupon loses his seniority" language of Sec. 2.1(1) of the Plan, which necessarily refers to the collective bargaining agreement in effect at the time of the employee's termination. *Pet. App.* at 27a-28a.

Based on the Plan language and the terms of the collective bargaining agreement incorporated by reference, the trustees determined that Petitioner could not count this second period of

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v. Union De Tronquistas, 29 F.3d 1, 2 (1st Cir. 1994) (collective bargaining agreement); *Cornell University v. UAW Local 2300*, 942 F.2d 138, 139 (2d Cir. 1991) ("[W]hen a Collective Bargaining Agreement enumerates those matters subject to arbitration, may it reasonably be inferred that those not enumerated are excluded . . . [?] We think the answer to the question is found generally in the Latin maxim *expressio unius est exclusio alterius*--specific inclusion of one thing is the exclusion of another."); *Ulmer v. Harsco Corp.*, 884 F.2d 98, 103-04 (3rd Cir. 1989) (Plan outlines specific circumstances in which severance benefits shall not be allowed; therefore, such benefits should be allowed in all other situations).

employment toward his pension, since he lost his seniority when he voluntarily resigned from GLI in 1987 and, thereby, ceased to be an active participant in the Plan. Again, Petitioner's pension based on his 10 years' service from 1977 to 1987 is fully vested and not at issue in this litigation.

Because Sec. 6.2(b) of the Plan affords the trustees discretionary authority, *see Pet. App.* at 23a-24a, 39a, both the district judge and the court of appeals reviewed this determination for any abuse of that discretion. They found none. Indeed, the trustees' conclusion represents the best reading of the controlling Plan language. The lower courts recognized as much. *Pet. App.* at 29a (court of appeals finds the trustees' interpretation to be "legally correct"); *id.* at 40a (district judge describes trustees' interpretation of Sec. 2.1 as reflecting the "most natural reading" of the language).

This effectively disposes of the legal dispute between Petitioner and the Plan. Because Petitioner mischaracterizes the record and asserts specious arguments based on those representations, it is necessary to set forth some additional facts.

The Plan is operated by a six-member board of trustees; the Amalgamated Council of Greyhound Unions and GLI each select three trustees. As a jointly-trusteed, Taft-Hartley fund, the Plan is a legal entity separate and apart from both the union and the company. *Pet. App.* at 33a. The Plan precludes modification of its terms by unilateral representations or actions of either GLI or the union. *Res. App.* at 3a (setting forth Sec. 11.1 of the Plan); *Pet. App.* at 25a n. 7 (court of appeals notes that in light of Sec. 11.1, "any action taken by Greyhound without the concurrence of the Union can have no effect on the Plan."). This simply conforms to well-settled ERISA law. *See, e.g., Borst v. Chevron Corp.*, 36 F.3d 1308, 1322 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995); *Rodrigue v. Western and Southern Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991).

Petitioner contends that GLI representatives made certain promises to him in 1990 to induce him to return to work during the strike, including either restoration of his past Greyhound seniority or

crediting that time as "Employment Based Seniority." During the strike, GLI gave persons coming to work as bus drivers seniority credit for prior over-the-road driving experience. This was known in company parlance as EBS. Ultimately, the union challenged EBS as an unfair labor practice, and the National Labor Relations Board so held. *Greyhound Lines*, 319 NLRB 554, 571 (1995). EBS was thereafter formally rescinded. *Pet. App.* at 4a, 37a-38a. Petitioner suggests that the GLI representations somehow affected his pension rights. Whatever the company unilaterally promised Petitioner to get him to go to work during the strike cannot, as a matter of law, change his rights under the Plan. Both lower courts so ruled. *Pet. App.* at 25a & n. 7 (court of appeals finds that unilateral actions of GLI cannot bind the Plan); *id.* at 42a (trial court finds that whether GLI offered Petitioner EBS or restoration of his Greyhound seniority, neither would affect his pension rights under the Plan).

The procedural posture of the case is somewhat complicated in that Petitioner eventually joined independent claims against the Plan and GLI in the same action. Initially, Petitioner sued the Plan under ERISA for a declaration of his pension rights. In an amended complaint, Petitioner also asserted a state law breach of contract claim against GLI based on the promises supposedly made to him by the company representatives to induce him to return to work during the strike. *Pet. App.* at 4a. Unlike the ERISA claim against the Plan, this contract claim against GLI has never been considered on the merits. The trial judge found the contract claim to be preempted as a matter of federal labor law and did not reach the merits. *Pet. App.* at 32a. The Fifth Circuit held the claim was not preempted and, therefore, reversed and remanded for further proceedings. *Pet. App.* at 29a-30a & nn. 8, 9.

Further complicating the procedural history of the case was Petitioner's failure to exhaust his remedies under the Plan before filing suit. When Petitioner initially contacted the Plan about his pension rights, the plan manager informed him that no changes would be made because the entire issue of EBS remained in litigation. Petitioner did not appeal this determination to the trustees before bringing suit, thus violating both the exhaustion requirements

of the Plan itself and those imposed by ERISA. *Communications Workers Of America v. AT & T*, 40 F.3d 426, 431-32 (D.C. Cir. 1994) (canvassing cases and noting "well established" rule that plan participants seeking to establish rights pursuant to ERISA must exhaust internal remedies); *Denton v. First National Bank of Waco, Texas*, 765 F.2d 1295, 1303 (5th Cir. 1985) ("[C]ongress, in enacting ERISA, clearly wanted potential plaintiffs to first exhaust their administrative remedies before resorting to the federal courts."); *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980). After Petitioner brought suit, he and the Plan filed a joint motion with the trial judge requesting the case be held in abeyance to allow exhaustion of the internal remedies including review by the trustees. The trial court agreed. *Pet. App.* at 4a. As a result, the trustees had their first opportunity to review Petitioner's claim only after he filed suit. Because of Petitioner's own failure in this regard, what should have happened long before any judicial action began instead occurred during litigation.

Petitioner now argues that the trustees' decision is somehow suspect because it came while suit was pending and offered a fuller, more developed rationale than the plan manager's earlier response.[4] The timing of the trustees' review was a direct result of Petitioner's conduct. Thus, his suggestion that their decision simply amounted to an effort to manufacture a defense to this litigation is at best peevish and at worst little short of outrageous. While the trustees did not embrace the plan manager's precise reasoning, this is the whole point of requiring exhaustion of remedies in the first place. The trustees are charged with the fiduciary obligation to manage the Plan and its assets, and, accordingly, they must be given the opportunity to interpret the Plan. Moreover, it is their decision — not that of an underling — upon which the courts should pass. *See Communications Workers of America*, 40 F.3d at 432; *Amato*, 618

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[4]The net effect was the same. Neither the plan manager nor the trustees concluded Petitioner should receive additional pension credit.

F.2d at 567.[5]

Notwithstanding Petitioner's fuzzing of the record here, the trial judge and the court of appeals quite correctly held that the trustees properly construed the Plan language as precluding Petitioner's requested augmentation of pension benefits. Nothing about this case warrants further review.

ARGUMENTS IN OPPOSITION TO GRANTING WRIT

This case presents no issue worthy of review on *certiorari*, and this Court should devote no more time to it than is required to make that determination. Petitioner sought a declaration, pursuant to ERISA, regarding the time to be credited toward his pension. Following a trial on the merits, the district court held that the trustees had acted within their discretion in construing the Plan language. The Court of Appeals for the Fifth Circuit affirmed, finding that the trustees made a "legally correct" interpretation of the Plan and thus acted well within their discretion. *Branson v. Greyhound Lines, Inc.*, 126 F.3d 747, 758 (5th Cir. 1997); *Pet. App.* at 29a. In short, this is a garden-variety ERISA benefits case that was correctly resolved in conformity with well-settled legal principles governing such claims.

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[5]Petitioner further chides the trustees for seeking the advice of counsel in considering his appeal. Such consultation is hardly inappropriate. The trustees might well be faulted for deciding appeals without such input. In addition, Petitioner's counsel was given the opportunity to and did in fact provide the trustees with a position paper outlining his view on the question. *R. Vol. 5*, p. 74; *Plan Tr. Ex. E.*

1. The "abuse of discretion" standard outlined in this Court's *Firestone* decision sufficiently protects the interests of ERISA plan participants in avoiding improper denials of benefits, and, accordingly, this case fails to present an issue of sufficient importance to require review.

Review on *certiorari* and the concomitant investment of this Court's precious time and resources must be reserved for the truly exceptional case presenting an issue of such significance that it transcends the legal relationship of the parties and would, upon resolution here, recast the governing body of law. Generally, this sort of issue derives from a split among the circuit courts on a significant point of law or from a question of such great import that it will affect a broad spectrum of the citizenry. *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) ("Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'") (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). *See, e.g., Idaho v. Coeur d'Alene Tribe Of Idaho*, ___ U.S. ___, 117 S.Ct. 2028, 138 L.Ed.2d 438, 444 (1997) (certiorari granted to consider the "important . . . question" of an Eleventh Amendment bar to a suit brought by Tribe against Idaho over ownership interest in land under and around lake and related waterways); *Klehr v. A.O. Smith Corp.*, ___ U.S. ___, 117 S.Ct.1984, 138 L.Ed.2d 373, 380 (1997) (certiorari granted to resolve circuit split on application of statute of limitations in civil actions pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961-1968).

This case presents neither a disagreement among the circuits nor a profoundly important legal question. Petitioner does not even suggest the former as a ground for review here. Instead, he posits that this Court must reevaluate the "abuse of discretion" standard for judicial review of benefits decisions by plan trustees when they have been afforded such discretionary authority, as enunciated in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

Pet. at 9-10. According to Petitioner, this standard of review has amounted to a virtual immunization of plan trustees and their decision-making. Petitioner comes to this rather startling conclusion based on his legal research, which apparently "turned up a grand total of one reported case in which a court has held the deferential standard to have been met." *Id.* From this, Petitioner decries a legal crisis of epic proportion. This is nothing short of fatuous rhetoric. It is simply wrong from start to finish.

First, Petitioner's assertion about the frequency with which courts have found ERISA plan trustees to have abused their discretion in considering benefits claims since *Firestone* is hopelessly inaccurate. A rather cursory review by Respondent found some 17 cases decided in the last two years in which courts determined that plan trustees had abused their discretion in denying a claim for benefits. *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 443 (3rd Cir. 1997); *Shannon v. Jack Eckerd Corp.*, 113 F.3d 208, 210 (11th Cir. 1997) (court of appeals affirms district judge's decision to remand to plan for further review where its evaluation and denial were arbitrary and capricious); *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 521-22 (3rd Cir. 1997); *Spears v. Connors*, No. 95-6291 (6th Cir. Jan. 10, 1997), 1997 U.S. App. LEXIS 3609, *16; *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 541-42 (7th Cir. 1996); *Bellaire Gen. Hosp. v. Blue Cross Blue Shield*, 97 F.3d 822, 832 (5th Cir. 1996); *Canseco v. Construction Laborers Pension Trust*, 93 F.3d 600, 602 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1250, 137 L.Ed.2d 331 (1997); *Saffle v. Sierra Pacific Power Co.*, 85 F.3d 455, 461 (9th Cir. 1996) (remand to plan upon finding administrator abused discretion in interpreting plan language); *Epright v. Environmental Resources Management*, 81 F.3d 335, 341-42 (3rd Cir. 1996); *Donaho v. FMC Corp.*, 74 F.3d 894, 901 (8th Cir. 1996); *Dial v. NFL Player Supplemental Disability Plan*, No. H-96-1338 (S.D. Tex. Oct. 28, 1997), 1997 U.S. Dist. LEXIS 17460, *23-24; *Monroe v. Pacific Telesis Group*, 971 F.Supp. 1310, 1316 (C.D. Cal. 1997); *Hussey v. E.I. DuPont De Nemours & Co. Pen. & Ben.*, 963 F.Supp. 576, 582 (S.D. W.Va. 1997); *Norman v. Holland*, 962 F.Supp. 843, 845 (S.D. W.Va. 1996), *aff'd mem.*, No. 96-2693 (4th Cir. Dec. 2, 1997); *Boggs v. Trustees of United Mine*

Workers Health, 960 F.Supp. 1015, 1021 (W.D. Va. 1996); *Crocco v. Xerox Corp.*, 956 F.Supp. 129, 144 (D. Conn. 1997) (remanded to plan for further review upon finding of improper denial of claim); *Cornett v. Trustees of United Mine Workers Health*, 950 F.Supp. 746, 747-48 (W.D. Va. 1996).[6]

As these cases reflect, the courts do provide the requisite review of ERISA-governed benefits plans necessary to prevent trustees from overstepping their discretionary authority in resolving participant claims. Far from immunizing trustees or other fiduciary decisionmakers, the *Firestone* standard strikes an appropriate balance between the cost and inefficiency created by repeated judicial intervention in plan operations and the need to protect against the arbitrary or otherwise abusive denial of benefits. *See Brogan v. Holland*, 105 F.3d 158, 164 (4th Cir. 1997); *Communications Workers of America*, 40 F.3d at 432 (noting that requiring claims to be submitted to trustees before suit has many salutary effects including "preventing premature judicial interference with a pension plan's decisionmaking process" and "enabl[ing] plan administrators to apply their expertise and exercise their discretion to manage the plan's funds, correct errors, [and] make considered interpretations of plan provisions . . . ."). *Cf. Challenger v. Local U. No. 1 of Intern. Bridge*, 619 F.2d 645, 649 (7th Cir. 1980) ("Congress intended fund trustees to have primary responsibility for claim processing . . . . To make every claim dispute into a federal case would undermine the

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[6]These cases are illustrative rather than exhaustive. Respondent did not attempt to canvass all of the ERISA benefits cases decided post-*Firestone*. Respondent conducted a computer-aided search of decisions rendered in the past two years and supplemented that with a brief review of recent decisions reported in a private research service devoted generally to ERISA related topics. Given the limited scope of this search, there undoubtedly are additional cases decided in the past two years in which plan trustees have been found to have abused their discretion in denying claims for benefits. Moreover, Respondent did not attempt to review and analyze cases more than about two years old.

claim procedure contemplated by the Act. It would also burden employee benefit funds with substantial expense.").[7]

In sum, the reality is far from the dire — indeed catastrophic — circumstance Petitioner portrays in his petition. Given this faulty factual premise, Petitioner's hyperbolic conclusion may be excused (and properly disregarded) as a product of misguided reasoning. In the end, however, Petitioner offers no sound reason why this Court should revisit *Firestone*. Consequently, there is no basis for granting his petition.

2. This case was correctly decided below, and review here would affect neither the underlying judgment nor the legal relationship of the parties.

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[7]The *Firestone* decision did not, as a practical matter, substantially change how courts review ERISA benefits claims for the most part. Prior to *Firestone*, many courts presumed ERISA itself mandated an "arbitrary and capricious" standard for judicial review of trustees' decisions on benefits claims. *Firestone*, 489 U.S. at 114 ("most federal courts had adopted the arbitrary and capricious standard of review"). In *Firestone*, this Court held that the scope of judicial review must be drawn from the plan language as filtered through trust law. Thus, if the plan affords the trustees discretionary authority, a court can reverse their determination only for an abuse of that discretion. Otherwise, courts are free to review such determinations on a *de novo* basis. *Id.* at 115. In short, *Firestone* anchored the source of the standard of review in the plan language rather than in ERISA and defined the standard as one of abuse of discretion rather than of arbitrary and capricious decisionmaking. The former holding simply led plans to include language spelling out the authority afforded fiduciaries. The latter effectively made little difference, since abuse-of-discretion review is essentially the same as arbitrary-and-capricious review. *See Canseco*, 93 F.3d at 605 (finding the two standards to be functionally equivalent); *Donaho*, 74 F.3d at 898 n. 5 (the two standards reflect "a distinction without a difference").

Apart from the artificial question of *Firestone's* efficacy in protecting plan participants, Petitioner suggests the trial court and the Fifth Circuit made certain case-specific errors that he claims warrant further review here. Even assuming such errors actually occurred, this Court does not grant *certiorari* to consider so limited questions. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (discretionary review in the Supreme Court "depends on numerous factors other than the perceived correctness of the judgment"); *Pittsburgh Steamship*, 340 U.S. at 503 ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."). To do otherwise would transform this Court into little more than the court of appeals for the United States circuit. Moreover, however, the trial and appellate courts correctly decided the case on the facts and the law. No error infects the judgment against the Petitioner.[8] These contentions can be disposed of quickly:

●Petitioner contends GLI promised him restoration of Greyhound seniority rather than EBS when he returned to work in 1990, and, therefore, he must be allowed to accrue pension credit for this second period of employment. *Pet. App.* at 5. This is a non-issue as to the Plan. As the Fifth Circuit noted, whether GLI representatives promised Petitioner Greyhound seniority or EBS is a matter of dispute, but it is immaterial to the claim against the Plan. *Pet. App.* at 25a n. 7, 29a n. 8. The NLRB held EBS an unfair labor practice, and GLI then rescinded it. EBS cannot affect Petitioner's pension rights. To the extent Petitioner relies on a promise from the company of Greyhound seniority (assuming this actually reflects what was promised), it cannot affect his pension rights because it represents a unilateral action of GLI. Under the Plan language and

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[8]As Petitioner states the question presented for review, it represents precisely the sort of fact-bound issue inappropriate for review on *certiorari*. In addition, many of the factual assertions forming the basis of the question are themselves inaccurate, as discussed here.

settled ERISA principles, this sort of representation is legally ineffective to modify the Plan. *See* discussion, supra, at 4-5.

In making this argument, Petitioner also seriously misconstrues the NLRB decision. The Board and the Administrative Law Judge held EBS to be unlawful. *Greyhound Lines*, 319 NLRB at 554, 571. They made no findings about Petitioner in particular or the efficacy of any purported promises by GLI to restore past Greyhound seniority.[9]

●Petitioner suggests the Trustees acted inappropriately in reviewing his internal appeal while litigation was on-going. *Pet. App.* at 6-7. As discussed above, supra, at 5-7, this resulted from Petitioner's failure to timely exhaust his internal remedies. While the trustees' rationale differed from the plan manager's, it reflects a proper reading of the Plan language, as the lower courts found. There is nothing untoward about the trustees' actions. Had Petitioner's claim not been submitted to the trustees, the courts would have been unable to perform their duty. There could not very well be a review the trustees' decision for an abuse of discretion in the absence of a decision by the trustees. *Communication Workers of America*, 40 F.3d at 433 ("By permitting appellees' ERISA claim to proceed before obtaining a final decision from the Plan, the District Court left itself unable to apply properly the *Firestone* rule of deference.").

●Petitioner suggests the Trustees labored under a conflict because he was a strikebreaker, and, with resolution of the labor dispute, neither the union nor GLI had any particular incentive to

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[9]Contrary to Petitioner's assertion, the NLRB decision does not even deal with the *restoration* of past Greyhound seniority. It merely discusses the impact of EBS and in doing so compares the relative seniority of drivers awarded EBS when they came to work for the company during the strike with that of drivers having actual Greyhound seniority based on their continuous service with GLI. *Greyhound Lines*, 319 NLRB at 570-71.

help him. *Pet. App.* at 7. Petitioner's argument, however, is pure *ipse dixit*: Because Petitioner worked during the strike, the union necessarily bears him ill will, and, in turn, the union trustees rejected his appeal. According to Petitioner's theory, GLI, having made peace with the union, was content to go along. Petitioner offered no actual evidence to support this speculation. At trial, Petitioner did not testify that he or other strikebreakers had been the subjects of harassment or other disparate treatment at the hand of union adherents or company supervisors.[10] To the contrary, Petitioner admitted that the union had handled two grievances to his satisfaction, after the strike ended. *Pet. App.* at 24a-25a.

More to the point, the trustees' reading of the controlling Plan language represents not only a sound interpretation but the only reasonable one. Further, the trustees have never made a contrary interpretation of this language. *Pet. App.* at 26a.[11] These factors militate not only against a finding of abuse of discretion but also of any conflict. Had the trustees offered up an interpretation at odds with the plain meaning of the Plan language or which appeared inconsistent with prior interpretations of the same provision, a factfinder might be justified in concluding there had been an abuse of discretion (perhaps as a result of a conflict of interest), absent some extraordinary explanation for such a decision. *See, e.g., Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 638 (5th Cir. 1992), *clarified other grounds*, 979 F.2d 1013 (5th Cir. 1992) (an interpretation flying in the face of unambiguous plan language presents a "very strong indication" of an abuse of discretion). Such

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[10]Even if Petitioner had offered such evidence, it would not demonstrate that the trustees were motivated by such concerns in denying his pension claim. *See Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251, 1255-56 (2d Cir. 1996) (participant must adduce evidence that the fiduciary "was in fact influenced by such conflict").

[11]This was the first time such an issue had come before the trustees.

tangible evidence stands in marked contrast to the bare surmise Petitioner offers. Were Petitioner able to prevail on this kind of speculation, it would effectively create an irrebutable presumption of a conflict on the part of the trustees of every jointly-trusteed ERISA plan following the resolution of a labor dispute between the company and the union appointing those trustees. This is not, nor should it be the law.

If plan trustees labor under an actual conflict, this may be taken into account when a court reviews their decision for abuse of discretion. *Firestone*, 489 U.S. at 115.[12] The existence of any conflict is a question of fact. *Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251, 1257 (2d Cir. 1996); *Lowry v. Bankers Life and Cas. Retirement Plan*, 871 F.2d 522, 525 (5th Cir. 1989). *See also Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1309 & n. 6 (5th Cir. 1994). Here, following a trial on the merits, the district judge found no conflict. *Pet. App.* at 38a-39a. The court of appeals specifically considered this determination and discerned no reason to disturb it. *Pet. App.* at 24a. This Court is not the forum for Petitioner to take a third shot at a question of fact.

●Petitioner suggests the Plan provisions are in conflict but fails to provide this Court with the actual language or any explanation of the purported inconsistency. *Pet.* at 4. Petitioner has misread the Plan. As discussed, supra, Sec. 2.1(1) of the Plan specifically governs Petitioner's situation, *i.e.*, he wants to count a second period of employment with GLI toward his pension. This section provides that a person who leaves the employ of GLI and loses his seniority is no longer eligible to earn further pension credit should he later return to work for the company. *See Res. App.* at 1a (setting forth text of Sec. 2.1(1)).

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[12]Contrary to the position Petitioner has taken previously in this case, proof of a conflict does not then require the court to apply a *de novo* standard of review. Rather, as noted in *Firestone*, the conflict bears on whether the trustees abused their discretion.

Petitioner contends this conflicts with Sec. 2.4 governing breaks in service. While Sec. 2.4 uses a number of specially defined terms, it essentially addresses the circumstances under which an employee who has returned to work for GLI will be given pension credit for his *earlier* period of employment with the company. *See Res. App.* at 2a (setting forth text of Sec. 2.4). It is this section that protects Petitioner's pension based on the 10 years he worked for GLI immediately before his resignation in 1987. This is clear from the last two sentences of Sec. 2.4, which explain when "pre-break" pension credit (called vesting and benefit service in the Plan) will be counted. Sec. 2.4 simply does not deal with how the subsequent period of employment will be treated for pension purposes. Secs. 2.1 and 2.4 address different issues and do not conflict with each other.

Petitioner's argument on this point is inextricably fact-bound, as well, since it turns on the specific plan language rather than any fundamental legal principles. Accordingly, it is not fodder for review on *certiorari*. It does illustrate, however, that the trustees reached not only a sound interpretation of the Plan but the only reasonable one. Whatever standard were used to judge their interpretation of the Plan and, in turn, their disposition of Petitioner's request, their decision was proper. This, in and of itself, strongly weighs against granting review in this case. Even if something other than an abuse-of-discretion standard were applied, it would make no difference in this case. The Plan language permits no reasoned conclusion other than the one the trustees reached.

CONCLUSION

For the reasons stated here, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Respondent Greyhound Lines, Inc. — Amalgamated Council Disability and Retirement Plan states that it is a trust organized as provided in 29 U.S.C. § 186(c) and, as such, is not a corporate entity and has neither parent nor subsidiary companies or corporations.

APPENDIX[1]

ARTICLE II—PARTICIPATION, SERVICE, AND CONTRIBUTIONS

SECTION 2.1--PARTICIPATION

1. **Active participation.** Each individual who was a participant in one of the Prior Plans on March 18, 1987, and became an Eligible Employee whose seniority accumulated with the predecessor Greyhound Lines, Inc., or The Greyhound Corporation Is recognized under the Collective Bargaining Agreement or a collective bargaining agreement between a union and an Employer or Related Employer and whose seniority is carried over to his employment with the Company or a Related Employer shall become an "Active Participant" (herein so-called) in this Plan on the date he commences employment with an Employer. Only an Active Participant shall be eligible to accrue a benefit hereunder for Benefit service performed for an Employer. Notwithstanding anything to the contrary in this Section 2.1(1), however, an Active Participant who subsequently terminates employment with an Employer and thereupon loses his seniority under the Collective Bargaining Agreement (or a collective bargaining agreement between a union and an Employer or a Related Employer) shall

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[1]This appendix contains relevant portions of the governing plan document of the Greyhound Lines, Inc. — Amalgamated Council Retirement and Disability Plan. The Plan, in its entirety, appears in the record at R. Vol. 2, pp. 222-280 and as Defendant Plan's Tr. Ex. B.

thereafter cease to be an Active Participant regardless of whether such Participant is subsequently re-employed by an Employer or a Related Employer.

SECTION 2.4--BREAK IN SERVICE

If, and to the extent that, an Employee's Vesting Service or Benefit Service prior to the Effective Date was disregarded under the Break in Service provisions of a Prior Plan as of March 18, 1987, such service shall continue to be disregarded under this Plan.

With respect to an Employee's Vesting Service and Benefit Service that was not so disregarded under the Break in Service provisions of a Prior Plan, and with respect to such service on or after the Effective Date, if the Employee incurs a Break in Service after the Effective Date, the Employee's rights and benefits under the Plan shall be determined in accordance with his accrued Vesting Service and Benefit Service at the time of the Break in service and in accordance with the following rules. For a Participant who is reemployed by the Employer as a Re-Employed Employee, his pre-break Vesting Service and Benefit Service shall be counted in determining his rights and benefits under the Plan. For a Participant who is reemployed by the Employer as other than a Re-Employed Employee, years of pre-break Vesting Service and Benefit Service shall not be counted in determining his rights and benefits under the Plan.

ARTICLE XI--AMENDMENTS AND EXECUTION

SECTION 11.1--AMENDMENTS

1. **General**. The Company, through its President, and the Union, through its duly recognized elected or appointed representatives, jointly reserve the right to amend this Plan, provided that no such amendment shall result in diverting any part of the Trust Fund to any purpose other than the exclusive benefit of Participants or their beneficiaries. In addition, the Board of Trustees shall make any amendments it determines are necessary, with or without retroactive effect, to comply with the provisions of ERISA and the Code and the regulations issued thereunder.